INDEPENDENT HUMAN RIGHTS ACT REVIEW – UNISON'S RESPONSE
March 2021

1. UNISON is the UK's largest union with 1.3 million members. Our members are people working in the public services; for private contractors providing public services; and in the essential utilities. They include frontline staff and managers, working full or part time in local authorities, the NHS, the police service, colleges and schools, the electricity, gas and water industries, transport and the voluntary sector.

EXECUTIVE SUMMARY

2. The objective of the Human Rights Act was to 'bring rights home' i.e. to allow a remedy in domestic law for breaches of the European Convention on Human Rights ("ECHR"). Where previously UK citizens could only find a remedy to breaches of Human Rights in Strasbourg, these rights can now be exercised in UK courts. When adjudicating, Judges in the UK have recognised the requirement to consider Convention Rights and comply with the HRA. More than this, UK judges have influenced the thinking of the European Court of Human Rights ("ECtHR") as evidenced in ECtHR judgments and borne out by the fact that decisions of UK courts are rarely overturned by the ECtHR. Parliament's independence has not been affected in all of this, as it can choose to make correcting legislation where Courts identify breaches of Convention rights; or not. UNISON's view is that where breaches of Convention rights or the HRA are identified by courts, that the Government should be duty bound to lay amending legislation. UK Courts have ensured in its application of the HRA and Convention rights that its citizens have certainty in the judicial process, by providing clarity in the law.

INTRODUCTION

3. The UK and the EU have agreed by way of a political declaration, made on 22 November 2018, that their future relationship should incorporate the UK's commitment to respect the framework of the European Convention on Human Rights ("ECHR"). UNISON makes this response on the basis of the UK's clear commitment to uphold its obligations under the Human Rights Act 1998 ("HRA") and the clear understanding that the UK's fundamental commitment to human rights is steeped in its common law tradition.

4. UNISON has a strong track record in supporting cases which involve the fundamental rights of its members and we refer to some specific examples relevant to the HRA in more detail below. This commitment was evident when UNISON challenged the Lord Chancellor in Judicial Review proceedings under *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51, where the UK Supreme Court ("UKSC") held that the constitutional right of access to the courts, which is essential to the rule of law and is guaranteed by Magna Carta, was breached by the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 (SI 2013/1893) ("Fees Order").

The Fees Order was found to be an unlawful interference with the common law right of access to justice; as well as it being unlawful for failing to provide an effective remedy for breaches of rights granted by EU law and being indirectly discriminatory against women in its application. In its reasoning, the UKSC referred to the "*principle of effective judicial protection as a general principle of EU law, stemming from the constitutional traditions common to the member states, which has been enshrined in articles 6 and 13 of the European Convention on Human Rights…".* When they arise, Convention rights are embedded in judicial decision making. Other examples where UNISON has supported cases involving fundamental human rights include *Wandsworth LBC v Vining and UNISON* [2017] EWCA 1092 and *Lock v British Gas Trading Limited* [2014] CJEU C-539/12.

5. The basis for the Independent HRA Review ('IHRAR') is a "… perception that, under the HRA, courts have increasingly been presented with questions of "policy" as well as law". In responding, UNISON wishes to categorically state its full support for the ECHR and for the provisions of the HRA and for UK judges making those decisions under those provisions. UNISON holds that in a fully functioning democracy, Governments of every hue should not be afraid of their decisions being challenged within a judicial system that has the jurisdiction to ensure compliance with the principles contained within the HRA. UNISON is clear that the judiciary must, when asked, determine the lawfulness of policy decisions, and this is within the role of the judiciary.

6. UNISON makes its submission and commentary on the two separate themes identified within the IHRAR namely:

    a. The relationship between domestic courts and the European Court of Human Rights (ECtHR)
    b. The impact of the HRA on the relationship between the judiciary, the executive and the legislature

7. UNISON's comments make specific reference to the questions and terms of reference on the IHRAR where appropriate. Where there are overlapping or repeated requests for evidence and comments in the terms of reference and/or the questions, UNISON has cross-referenced responses to avoid repetition.

i. The relationship between domestic courts and the European Court of Human Rights

How has the duty to "take into account" ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?

8. UNISON sets out below its understanding of the UK Courts' duty to "take into account" of ECtHR jurisprudence. Recent decisions such as *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2 have seen the UKSC take a narrower view on the scope and nature of their

interpretative duty. It is UNISON's firm view is that there is no need for amendment of Section 2 HRA for the reasons set out below.

Duty to "take into account"

9. This question and the preamble to this IHRAR hint of a suggestion that UK judges have, as a matter of precedent, followed the ECtHR when it is not required to do so. UNISON's view is that in the main, Courts have determined cases based on its interpretation of the fundamental values set by the ECHR and the HRA.

10. Section 2 HRA asks that higher level courts in the UK "take into account" ECtHR jurisprudence when coming to their determinations. Lord Irvine was clear that this means that: "the Judges are not bound to follow the Strasbourg Court: they must decide the case for themselves"[1]. The late Lord Bingham envisaged that the UK would help to "mould the law by which we are governed in this area … British judges have a significant contribution to make in the development of the law of human rights."[2].

11. The former President of the Supreme Court, Lord Neuberger, in *Manchester City Council v Pinnock* [2010] UKSC 45 set out the UKSC's understanding of this duty to "take into account" of ECtHR jurisprudence (paragraph 48):

> *"This Court is not bound to follow every decision of the EurCtHR. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue with the EurCtHR which is of value to the development of Convention law (see e g R v Horncastle [2009] UKSC 14; [2010] 2 WLR 47). Of course, we should usually follow a clear and constant line of decisions by the EurCtHR: R (Ullah) v Special Adjudicator[2004] UKHL 26; [2004] 2 AC 323. But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber. As Lord Mance pointed out in Doherty v Birmingham [2009] 1 AC 367, para 126, section 2 of the HRA requires our courts to "take into account" EurCtHR decisions, not necessarily to follow them. Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line".*

[1] https://www.biicl.org/files/5786_lord_irvine_convention_rights.pdf
[2] Hansard, HL vol 582, col 1245 (3 November 1997).

12. There has been some debate about whether Strasbourg law should be mirrored in this way, and depart from Strasbourg only exceptionally or whether instead, judges can take into account Strasbourg law, but depart from it, where there are good reasons for this under domestic law which have not been considered or appreciated by Strasbourg. This school of thought suggests that national jurisprudence can 'outpace' Strasbourg and extend Convention rights.

13. In *R (on the application of Quila) v SSHD*[3], Lord Wilson determined that the court need not follow the line in the ECtHR decision *Abdulaziz v UK*[4], as there was no 'clear and consistent jurisprudence' to follow. However, the UKSC decided that it was "exceptionally acceptable" to depart from ECtHR jurisprudence Article 6 in *R v Horncastle*[5], as the ECtHR's decision in *Al-Khawaja*[6] did not properly consider the domestic process in the UK which the UKSC said struck "*the right balance between the imperative that a trial must be fair and the interests of victims in particular and society in general*". The Strasbourg test was seen not to strike this balance, and this view was later endorsed by the Grand Chamber, when the UK appealed the decision in *Al-Khawaja & Tahery v UK*[7].

14. Most recently in *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2, a case about domestic provisions around compensation for miscarriages of justice and their compatibility with Article 6, the UKSC decided to follow their precedent (*R (Adams) v Secretary of State for Justice* [2011] UKSC 18; [2012] 1 AC 48) rather than a Grand Chamber decision of *Allen v UK* (application. no. 25424/09). The UKSC's decision to do this was based on the following considerations: (i) that the ECtHR case law was not applicable on the facts (ii) there was only weak authority (iii) Strasbourg jurisprudence had not considered something fundamental in UK law (iv) even if ECtHR jurisprudence was applied it would not make a difference to the outcome (v) Strasbourg jurisprudence was poorly reasoned (vi) or was in their view incorrect. UNISON considers that the approach taken by the UKSC in this case was appropriate and did not involve an unwarranted intrusion on their part into areas of policy. It was a permissible legal approach consistent with the court's independent constitutional role.

15. Where Strasbourg has not yet considered an issue under the ECHR, the judges in *Ambrose v Harris (Procurator Fiscal)* [2011] 1 WLR 2435 reasoned that "the claim should not succeed". Lord Kerr, the current President of the UKSC's dissenting view here was that it was open to the UKSC to adjudicate on such issues:

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[3] https://www.bailii.org/uk/cases/UKSC/2011/45.html
[4] https://www.bailii.org/eu/cases/ECHR/1985/7.html
[5] https://www.supremecourt.uk/cases/uksc-2009-0073.html
[6] https://www.bailii.org/eu/cases/ECHR/2011/2127.html
[7] 15.12.11 (Applications nos. 26766/05 and 22228/06

"…*I believe that, in the absence of a declaration by the European Court of Human Rights as to the validity of a claim to a Convention right, it is not open to courts of this country to adopt an attitude of agnosticism and refrain from recognising such a right simply because Strasbourg has not spoken*"'

16. The judiciary's role is to interpret the law, and this is what they have done. The House of Lords in *Re G* and *Campbell* went beyond the ECtHR's interpretation of Article 8. In *Re G* the House of Lords held that Northern Ireland was acting contrary to Art 8 by placing an *absolute* ban on adoption by unmarried couples. This decision was not deemed politically controversial as Northern Ireland was out of step with the rest of the UK. Criticism is reserved for judgments that are deemed political, such as *R (Limbuela) v Secretary of State for the Home Department* and *EM (Lebanon)* and *A and others*.

17. Where cases are referred to the ECtHR, domestic decisions such as *R (S) v Chief Constable of the South Yorkshire Police and R (Marper) v Chief Constable of the South Yorkshire Police* are then declared contrary to Convention rights.

18. How then should domestic cases be decided? Outside the realm of judicial decisions, the ordinary person requires legal principles that are certain and predictable. This requires some uniformity to ECHR principles in member states, as set out under Article 46 ECHR, to bind states to accept Strasbourg decisions. This is of course a matter for states rather than judges. Where judges fail to follow clear and constant Strasbourg jurisprudence, then a person's recourse is an application to the ECtHR. However, it should not be down to citizens to have to resort to the ECtHR, as such applications require resources, and in the absence of legal aid, any inability to challenge such rights in domestic courts, is likely to be a block to access to justice. Certainly, states that fail to deal with human rights' breaches could be knowingly permitting such breaches to continue to subsist until action is taken under s10 HRA. However, actions under s.10 HRA are rare and such actions sit with the Government rather than the judiciary.

19. As seen in Q.1 (c) below, opportunities for dialogue exist, where difficult decisions are to be made by judges, and UK judges have been seen to adopt a "balancing approach". This is why UK judges do not simply blindly follow ECtHR decisions and their reasoned judgements explain this. In Lord Irvine's words: 'a Court which subordinates itself to follow another's rulings cannot enter into a dialogue with its superior in any meaningful sense'.

20. It is of course open to Parliament to suggest that judges may go beyond Convention rights or to allow judges to take a balanced approach in line with domestic provisions as in *R v Horncastle.*

b) When taking into account the jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to States under that jurisprudence? Is any change required?

21. The margin of appreciation gives a national authority room for manoeuvre in fulfilling some of its principal obligations under the ECHR. Where judges identify breaches with the HRA or Convention rights, within this "margin of appreciation" it is then incumbent on Parliament to step in to legislate in these areas.

22. As evidenced below, UNISON's position on the current application of the margin for appreciation by UK courts is that it is appropriate. The current regime allows sufficient deviation in line with UK domestic law and Government policy. UNISON does not consider that UK Courts have abused its margin of appreciation or used it to further an activist agenda that has unduly interfered with government policy. For these reasons, UNISON does not consider that any changes to the current regime are warranted.

The approach of Domestic Court and Tribunals

23. There are two aspects of Convention rights most relevant to UNISON: individual rights and collective rights. Under both these discrete aspects of ECtHR jurisprudence, UNISON considers there are some areas where change is required. In particular, to adequately protect workers from detriment for taking part in industrial action, and separately, to protect the union's fundamental rights to collective bargaining.

24. Under UK law, there are a number of rights set out in the Trade Union Labour Relations (Consolidation) Act 1992 ('TULRCA 1992') that enshrine a worker's freedom to join and participate in an effective trade union. There have been numerous cases in both the ECtHR and domestically in the UK on the extent of these rights and their interpretation. There is not space in this consultation response to address each of these in detail. However, UNISON submits that the following points are some key considerations to understand ECtHR jurisprudence and how the UK has domestically interpreted rights under the ECHR.

25. The different scope of rights to those defined separately as 'worker' or 'employee' remains an ongoing area for concern, particularly where employment status is disputed, and the factual background is uncertain. Article 11 ECHR provides that everyone has, in principle, the right of freedom of association, including the right to form or join a trade union for the protection of their interests. The Grand Chamber of the ECtHR held in *Sindicatul 'Pastorul cel Bun' v Romania* [2013] ECHR 646 that 'everyone' means 'everyone in an employment relationship'. However, the UK High Court decided in *IWGB v CAC and Roofoods Limited t/a Deliveroo* [2018] EWHC 3342 (Admin) that meal delivery riders were not in an employment relationship and so their trade union was not permitted to exercise

its right to apply for statutory recognition on behalf of those individuals each as a 'worker' under s.296 TULRCA 1992. The court held that restrictions and interference with the rights under Article 11 ECHR were permissible in achieving a fair balance with competing interests under the UK's statutory recognition procedure. While the Court of Appeal has not yet (at the time of writing) promulgated its judgment from the union's appeal heard in February 2021 on this matter, the bar from employment status of individuals' to the potential enjoyment of rights under Article 11 ECHR transposed to UK law remains a wide area of debate where change seems overdue[8].

26. The ECtHR held in *Aslef v. UK* [2007] ECHR 184 that freedom of association under Article 11 ECHR implies freedom in association, whereby trade unions should in principle be free to draw up their own rules and administer their own affairs and the state should only interfere where there are convincing and compelling reasons to do so. This case involved two competing Convention rights (an individual's freedom to join and the union's freedom to refuse membership) and the ECtHR found that the state's margin of appreciation is narrow because freedom of association is so fundamental to democratic ideals. Some expert legal commentators[9] consider that UK law (ss.64 and 174 TULRCA 1992) does not entirely conform with Convention standards on the freedom for trade unions to manage their own affairs.

27. The introduction of statutory protections against prohibited inducements was because of the ECtHR's judgment in *Wilson, Palmer and Doolan v UK* [2002] IRLR 568. The case arose because employers in the late 1980s were offering so called 'sweeteners' to their employees in order to encourage them to move from a system of collective bargaining to individual contracting. The Court of Appeal held that this was an unlawful deterrent in 1993. The Conservative government brought in statutory amendments to TULRCA 1992 to effectively reverse the CoA's judgment and ensure that it would be lawful for employers to offer sweeteners and this was what the House of Lords decided in 1995. The ECtHR ruled in 2002 that the House of Lords' judgment was incompatible with the right to join an effective trade union under Article 11 ECHR. A New Labour government therefore repealed the Conservative government's legislation and introduced the new statutory rights to protect against prohibited inducements. However, it should be noted that there remains debate on whether these statutory rights adequately transpose what was required by the ECtHR's judgment in *Wilson*. For example, the European Committee of Social Rights considers that UK law (ss.145A and 145B TULRCA 1992) remains incompatible with the European Social Charter, principally because the remedy is only

[8] For example in a different context on a bar caused by employment status, following the High Court's judgment in *R (on application of IWGB) v Secretary of State for DWP and others* [2020] EWHC 3050 (Admin), it has been reported that BEIS will lay a statutory instrument on 1 March 2021 for secondary legislation to widen applicability of the relevant health and safety law to those employed as a 'worker'

[9] See Harvey on Industrial Relations and Employment Law, published by LexisNexis ('Harvey's), Volume M, paragraphs 277-278

available to some workers, rather than any relevant worker and the union itself being permitted to complain. The law in this area stands to be determined by the UKSC in the forthcoming appeal by the employer against the Court of Appeal's judgment in *Kostal UK Limited v Dunkley and others* [2019] EWCA Civ 1009.

28. There is currently no UK law that directly protects a worker from detriment (short of a dismissal) for taking part in industrial action. In contrast, the ECtHR held in *Danilenkov v Russia* [2009] ECHR 1243 that the victimisation of trade unionists was 'one of the most serious violations of freedom of association' because it is capable of jeopardising the existence of the union. While there are protections under s.146 TULRCA 1992, that statutory right is drafted with the protection to apply only for activities that are taken at an 'appropriate time'. This means that for workers who participate in industrial action when the individual should have been working, the protection falls outside an 'appropriate time' and so cannot be protected from detriment suffered in consequence. Many legal commentators have asserted that it is likely that the absence of protection from detriment is contrary to Article 11 ECHR. [10]It is also worthwhile considering how industrial action fits into the right to respect for freedom of expression under Article 10 ECHR. This is a subject that falls to be determined by UK tribunals and courts. An employment tribunal has recently found that 'the UK has failed to provide effective and clear judicial protection' in respect of industrial action which is part of the rights guaranteed by Article 11 ECHR (*Mercer v Alternative Futures Group and other* ET case 2411052/19, para 87) while rejecting a complaint under s.146 TULRCA 1992. Separately, a different employment tribunal found that trade union activities at an appropriate time can (and must) be interpreted so as to include lawful industrial action under the relevant provision of the Human Rights Act 1998 (*Morais and others v Ryanair DAC* ET case 3200429/20 and others, paras 13-24). Both cases stand to be determined before the Employment Appeal Tribunal this year.

29. In the context of Convention rights and collective rights of trade unions, there are three relatively recent cases that are noteworthy to show that a change is desirable on the UK's domestic interpretation of these rights under Article 11 ECHR. The first is *Demir and Baykara v Turkey* [2008] ECHR 1345, a decision of the Grand Chamber of the ECtHR which held that, in principle, the right to collective bargaining is a fundamental human right. This was a seminal judgment that clarified the scope of the right to collectively bargain. That said, the precise boundary remains somewhat unclear because it includes the rights of workers to take collective action for the protection of their interests, where separate cases have identified limitations on this, aside from consideration to the state's margin of appreciation. Secondly, in *RMT v UK* [2014] ECHR 366, the ECtHR held that the UK's statutory ban on all forms of secondary industrial action (under s.224 TULRCA) fell

[10] See Harvey's Volume, NII, paragraphs 699-700

within the margin of appreciation and did not infringe Article 11 ECHR. Thirdly, in *Unite v UK* [2016] ECHR 1150, the ECtHR found the abolition of the Agricultural Wages Board did not violate the union's right to collectively bargain (on behalf of the 18,000 members employed in the agricultural industry) under Article 11 ECHR. In both the latter cases, the ECtHR placed very heavy reliance on the UK state having a wide margin of appreciation in rejecting the complaints by the respective trade unions, but there are further questions that remain to be answered on domestic interpretation of issues under these topics.

30. In the case of *Pharmacists' Defence Association Union v Boots Management Services Ltd* [2017] EWCA Civ 66, the Court of Appeal was required to consider the ECtHR's judgment in *Unite* on the question of whether a statutory mechanism for collective bargaining breached the independent trade union's right to collective bargaining under Article 11 ECHR. The situation arose because the employer recognised a 'sweetheart' non-independent union which effectively blocked the independent union from being recognised to collectively bargain for its members. The CoA (at para 54) specifically referred to the wide margin of appreciation enunciated in *Unite* when deciding that it was satisfied the statutory recognition mechanism provided under Schedule 1 Part VI of TULRCA 1992 adequately balanced the independent trade union's rights under Article 11 ECHR. Some expert legal commentators[11] question whether the court's solution to the problem (for a worker notionally represented by the non-independent union to apply to the Central Arbitration Committee for it to be derecognised) adequately addresses the problem because the incumbent 'sweetheart' non-independent union was recognised on a very narrow range of issues.

31. In contrast, the Court of Appeal took a more positive view to interpret domestic rights of trade unions to collective bargaining under Article 11 ECHR in *Wandsworth LBC v Vining and UNISON* [2017] EWCA Civ 1092. The case involved an issue on whether the statutory exclusion of parks police from collective consultation interfered with the rights to collective bargaining under Article 11 ECHR. The CoA held that, in light of *Demir*, the rights of the parks police and UNISON (in representing those individuals) plainly fell within the scope of Article 11 ECHR and so the UK had a 'positive obligation to secure the effective enjoyment of those rights'. Therefore, the statutory exclusion had to be read as not extending to the parks police in order for UNISON's claim about collective consultation to proceed. Despite the judges pointing to a lacuna in the law and expressing their inability to remedy legislative deficiencies, Parliament is yet to correct legislation to account for this deficiency through a properly consulted upon and sufficiently scrutinized Act of Parliament.

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[11] 'Article 11 ECHR and the right to collective bargaining: *Pharmacists' Defence Association Union v Boots Management Services Ltd'* by Alan Bogg and Ruth Dukes, Industrial Law Journal, published by Oxford University Press, Volume 44, No.4, December 2017

32. A further point should also be considered on this topic: namely, that it is often political disagreement that shows change is needed on the domestic interpretation of ECtHR jurisprudence. The Agricultural Sector (Wales) Act 2014 received royal assent after a challenge by the UK government on legislation that sought to effectively overturn the effects of the *Unite* judgment in Wales, where the Welsh Government is permitted to set up an Agricultural Advisory Panel to make recommendations that include wages for agricultural workers. This is because the Supreme Court found that agricultural terms and conditions of employment were a 'devolved' topic and so fell within the competence of the Welsh Government. It remains to be seen how this constitutional dispute will be resolved, as well as a separate one on the impact of certain provisions of the Trade Union Act 2016, which apparently clashes with the Trade Union (Wales) Act 2017 that applies to devolved Welsh public bodies and to trade unions in public services delivered by devolved Welsh public bodies.

c) Does the current approach to 'judicial dialogue' between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?

33. The UKSC has over the years fostered and preserved its approach to "judicial dialogue" with the ECtHR on the application of ECtHR jurisprudence to UK circumstances. UNISON is content that the approach of the UK's courts has been sensible, and this is borne out by their reasoned judgments and the way they have influenced ECtHR decisions as evidenced in the cases mentioned above and below. The fact that largely UK cases have not recently been overturned by the ECtHR, is further evidence of this.

34. When giving evidence to the Joint Committee on Human Rights, Baroness Hale of Richmond[12], when asked this question said that "there have obviously been informal links of a variety of sorts". When asked for examples of how domestic cases have influenced the thinking of the ECtHR, she stated:

> "*…UK courts are now reasoning the cases in the same way in which the Strasbourg court would be reasoning them. They are not necessarily reaching the same conclusion, but they are taking the rights, looking at the limitations of the rights and asking whether those limitations apply, so it is the same sort of reasoning as Strasbourg. This means that when Strasbourg gets a case from the United Kingdom it recognises the way the United Kingdom court has been arguing the case and reasoning to the result.*

[12] https://committees.parliament.uk/oralevidence/1661/html/

That means that it has influenced the thinking of the Strasbourg court. It now very rarely disagrees with us".

35. The UKSC is a much respected, credible institution, which is held in high esteem nationally and internationally. Rather than, as Lord Irvine puts it, simply "roll-over"[13], the UKSC has been known to influence decisions from Strasbourg. As set out in Q1 (a) paragraphs 12-18 above where in *R v Horncastle* the UKSC did not follow the ECtHR because of the "lack of clarity" and "practical difficulties" in their approach, and concluded that there were sufficient safeguards in UK law that ensured that the use of hearsay did not violate Article 6; and also *Brown v Stott* [2001] 2 WLR 817 and the ECtHR's subsequent judgment in *O'Halloran and Francis v UK* (15809/02 and 25624/02) (2008) 46 EHRR 21.

36. In order to preserve this relationship and strengthen dialogue, it is incumbent on the Government of every hue to support the workings of the judiciary, given the judiciary's independence, and also their efforts to ensure that the decisions from the UK are sound and not open to challenge in the ECtHR. This includes speaking in support of the UK's independent judiciary and its proud common laws traditions. The Government's shameful stance and abject failure to promptly react to abuse to the judiciary, when it lost *R(Miller)v Secretary of State for Exiting the EU* [2017] in the High Court and the then Lord Chancellor's failure to criticise the abuse faced by the judiciary[14], must not be repeated.

ii. The impact of the HRA on the relationship between the judiciary, the executive and the legislature

The judiciary, the executive and the legislature each have important roles in protecting human rights in the UK. The Review should consider the way the HRA balances those roles, including whether the current approach risks "over-judicialising" public administration and draws domestic courts unduly into questions of policy.

a) Should any change be made to the framework established by sections 3 and 4 of the HRA? In particular:

i) Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner

[13] See footnote 1
[14] https://www.reuters.com/article/us-britain-eu-judges-idUSKBN1701BA

inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)?

ii) If section 3 should be amended or repealed, should that change be applied to interpretation of legislation enacted before the amendment/repeal takes effect? If yes, what should be done about previous section 3 interpretations adopted by the courts?

37. UNISON does not consider that any changes to the framework in sections 3 and 4 of the Human Rights Act (HRA) should be made. UNISON considers that the current legislative form strikes a necessary and proportionate balance between giving effect to the individual rights as articulated in the European Convention on Human Rights (ECHR) and Parliamentary sovereignty. UNISON makes the following points below in support of this submission.

38. First, as set out in the Long Title, the legislative purpose of the HRA is to "give … effect to the rights and freedoms guaranteed under the European Convention on Human Rights". The preamble to this Inquiry's terms of Reference likewise expressly acknowledges this in stating that "the HRA is underpinned by the UK's international obligations under the Convention, and the UK remains committed to upholding those obligations." The mechanisms or procedures by which effect is given to those ECHR rights is an important aspect of fulfilling those commitments and should not be interfered with lightly or amended in such a way that diminishes those rights, or, importantly, denies individual citizens effective access to legal remedies when their rights have been interfered with.

39. Second, it is worth stating the obvious that it is the Court's constitutional role to interpret legislation and give effect to it in accordance with law. An essential aspect of the Court's constitutional role is to determine the extent to which the UK's international obligations affect cases in domestic legal proceedings. This is especially so in cases where the UK is signatory to or otherwise bound by international treaties and where individuals have a right of appeal to a Court of Final Appeal outside the UK domestic legal system. Examples of where the UK is bound by international obligations and there are rights to complain or appeal directly include the International Labour Organisation, the World Trade Organisation and the International Criminal Court. Amending the current framework runs the risk of undermining the Court's constitutional role to determine issues of law (as sections 3 and 4 HRA requires) or usurping their authority to do the same.

40. Third, it should be acknowledged and accepted that a system that seeks to give domestic effect to individual rights and obligations deriving from international law necessarily creates tension. The current framework in sections 3 and 4 HRA necessarily involves acceptance of ECtHR as the ultimate arbiter of the substance of those universal rights. From time to time the Courts legal decisions giving effect to and upholding individual Convention rights will not be in line will UK government policy. Obvious examples of this

can be seen with the prisoner voting case and the *Abu Qatada* case. A nation cannot purport to give effect to universal individual rights without, on occasions, being obliged to submit to protecting the full extent of those rights and obligations as articulated by the final arbiter. Independent courts determining such cases are obliged to weigh difficult factors and, without fear or favour, come down on the side of what is in accordance with law. This, though occasionally problematic for the government, does not amount to those courts being "unduly drawn into the area of policy" or usurping the role of Parliament. The Courts role in giving effect to those rights as set out in sections 3 and 4, for the main, remain uncontentious and not in conflict with ECtHR jurisprudence. It is encouraging to note that disagreements between the domestic UK Courts and the ECtHR over the substance and effect of those universal rights are rare. For those reasons, UNISON considers that it is undesirable to consider changes to the current regime. UNISON considers that it is important that the role of the ECtHR in articulating universal human rights concepts is preserved and the provision of section 3 and 4 HRA are retained. As we have set out in other parts of this submission, ultimately, the UK courts are not bound to follow ECtHR jurisprudence and that can afford the UK a margin of appreciation in cases where it wishes to reach a different view in any given case.

41. Fourth, there is a danger that changes to framework set out in sections 3 and 4 HRA, simply as a response to occasional disagreements or divergences between the UK government policy and the domestic or ECtHR jurisprudence, might have the effect of limiting rights or limiting access to the Courts to protect these rights, thereby undermining the express purposes of the legislation. Any attempt to reduce the Courts powers or place a fetter on their ability to interpret, or give effect to or make declarations of incompatibility, for short term political reasons, will have the effect of diminishing rights, and will be out of step with purposes of the HRA. As we have indicated, we consider that the current regime under sections 3 and 4 strikes a necessary proportionate balance and that there is no need or reason to interfere with this legislation.

42. Fifth, there may be unintended consequences if the current framework in sections 3 and 4 HRA is amended in a way which further restricts individuals' rights. It may mean that there are more appeals to ECtHR. The more appeals there are, the more the UK government loses credibility internationally. This has the potential to become a wider political problem for the government wishing to assert that other countries do not respect universal human rights. A regime that makes it unduly difficult for individuals to access justice through the Courts may fall foul of the common law right to access to justice: see *R (UNISON) v Lord Chancellor* [2017] UKSC 51. It may also mean that there is cause for complaint that the UK was failing to comply Article 2(3) of the *International Covenant on Civil and Political Rights* (ICCPR) to which the UK is a signatory, which requires parties to the treaty to ensure that any person whose rights and freedoms have been breached to

have an effective remedy. Many of the rights and freedoms in the ICCPR are replicated in the ECHR.

43. Sixth, as set out above the UK Courts are not bound by the jurisprudence of the ECtHR but are required by section 2 to "take into account" that jurisprudence. In such situations, the UK Courts are able to use ECtHR jurisprudence, and any other relevant jurisprudence and international instruments they deem appropriate, to assist them in giving effect to or interpreting the ECHR rights protected in the HRA in the manner they see fit. This uncontroversial and flexible interpretative approach to section 3 HRA can be seen in the recent decision of the Supreme Court in *Gilham v Ministry of Justice (Protect Intervening)* [2019] 1 WLR 5905 where the Court, in determining whether whistleblowing provisions in the Employment Rights Act 1996 protected judges, held:

> *Bearing in mind, therefore, the parallel seen in* Ghaidan v Godin-Mendoza[15] *between section 3(1) and conforming interpretation in EU law, its strictures against attaching decisive importance to the precise adjustment needed to the language of the provisions, and the ease with which this court interpreted identical language to include judges as limb (b) workers in* O'Brien[16]*, I can reach no other conclusion than that the Employment Rights Act should be read and given effect so as to extend its whistle-blowing protection to the holders of judicial office.*

44. Courts have set their own limits to the extent to which they will read down inconsistent legislation. This self-imposed limit can be seen in the decision of the House of Lords in *R (Anderson) v. Secretary of State for the Home Department* [2003] 1 AC 837 at para 30 where Lord Bingham held:

> *"To read section 29 as precluding participation by the Home Secretary, if it were possible to do so, would not be judicial interpretation, but judicial vandalism: it would give the sections an effect quite different from that which Parliament intended and would go well beyond any interpretative process sanctioned by section 3 of the 1998 Act …"*

45. A broad outward-looking approach to judicial interpretation is adopted in many common law jurisdictions; both where ordinary human rights legislation is in place containing similar rights to those in the ECHR (eg. New Zealand)[17], where there are constitutional Bills

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[15] *Ghaidan v Godin-Mendoza* [2004] AC 557

[16] *O'Brien v Ministry of Justice (formerly Department for Constitutional Affairs)* [2013] 1 WLR 522,

[17] See for example, the interpretative approach of the New Zealand Court of Appeal in *Ministry of Transport v Noort* [1992] 3 NZLR 260; and *Simpson v Attorney-General* [1994] 3 NZLR 667.

of Rights (eg. Canada)[18] and where there are no express human rights enactments or constitutional bills of rights (eg. Australia)[19].

46. UNISON considers that the existing framework in sections 3 and 4 already provides the UK with ample room to articulate its rulings differently from ECtHR rulings whilst upholding universal rights contained within the ECHR, through developing its own definitions and interpretations of those rights. That said, UNISON considers that any additional express requirement on UK Courts to distance themselves from the ECtHR jurisprudence will weaken the healthy dialogue that currently exists between the UK courts and the ECtHR. A divergence of opinion may develop between the two regimes in terms of interpretation of the same rights. This would be undesirable for individuals and the government as it could mean increased uncertainty about the meaning or substance of these universal rights. This could mean a dilution of those rights which for all the reasons set out above is clearly undesirable.

iii) Should declarations of incompatibility (under section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament in determining how any incompatibility should be addressed?

47. UNISON does not consider that declarations of incompatibility under s.4 should be considered as part of the initial process of interpretation under section 3 HRA. There is a real danger that such a requirement will have the effect of pre-empting a full determination of a complaint, create collateral actions and lead to an undermining or usurping of the Court's constitutional role. The issue of compatibility is a question of law, for courts to decide after interpreting the relevant legislation and ECHR rights.

48. It is not clear what process could usefully replace the existing framework without diminishing the role of the Courts to interpret and give effect to ECHR rights. As we have indicated, determining questions of law is the constitutional role of the Courts under the UK system of government. A pre-emptive role for the executive and Parliament would seem to usurp this constitutional role and may have the effect of diminishing the protections contained in the ECHR. Such a change may lead to the initial stages in human rights cases being determinative of the entire proceedings, where for example the Government attempts to make the declaration of incompatibility stage a preliminary issue, leaving it for parliament to resolve. There is a danger that such issues or questions might get lost in the parliamentary process, especially in cases where the challenge in question

[18] The Supreme Court of Canada in *Mounted Police Association of Ontario v. Canada (Attorney General),* 2015 SCC 1, [2015] 1 S.C.R. 3

[19] The High Court of Australia in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] 214 CLR 1.

is politically damaging to the government. There is real danger that complaints to the Court will be side-lined by collateral attacks by the Government's lawyers that delay or defeat a full hearing of the complaints. This would be undesirable as it may have the effect of preventing the upholding of universal rights and prevent effective remedies being given for breaches of those rights.

49. Further, if Parliament is to have an increased role at the early stages of legal challenges, this will likely clog up the parliamentary system; requiring them to perform essentially interpretative exercises that the Courts currently carry out. The substance of individual rights might end up modified and out of step with international jurisprudence thus undermining them. The whole process will significantly delay the process of redress for individuals. The system of human rights protection could be compromised as a result. Again, this is not something that is desirable for any government that purports to uphold universal human rights.

50. UNISON considers that section 4 declarations should remain the primary remedial provision in the HRA, to be engaged only after the Courts have gone through full legal process of giving effect to the rights where possible and making their determinations under section 3. It is not clear how a court could reach such a conclusion on whether or not to issue such a declaration without first forming a concluded view on the effects of the legislation in question and the impact of that legislation on an individual's ECHR rights. To make the section 4 legal process anything other than remedial runs that risk of side-lining or undermining the Courts constitutional role. The interpretative mechanism in section 3 HRA has regularly been applied by Courts for the past two decades. Altering the balance between sections 3 and 4 HRA risks the re-opening of plenty of existing precedent, and destabilising much of the HRA case-law. Such a regime will likely create great uncertainty for individuals and the government in determining what the effect of ECHR rights are and will diminish their ability to properly plan or create policy. Such a legal vacuum would be wholly unsatisfactory and would undermine the standing of the UK internationally.

b) What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?

51. UNISON is not aware of any designation orders made under Section 14.1 affecting its members, so is unable to usefully respond to this question.

c) Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights? Is any change required?

52. The classic approach of UK courts to the application of s.3 Human Rights Act 1998 was given by the House of Lords in *Ghaidan v Godin-Mendoza* [2004] AC 557, at paragraphs

26-33. In the context of trade unions, workers and Convention rights, there are relatively few examples to show how courts and tribunals have dealt with provisions of incompatible subordinate legislation. UNISON considers that change is required to ensure that Parliament produces legislation promptly in order to comply with judgments of the ECtHR. This problem has been widely recognised, most recently by Baroness Hale in oral evidence to the Joint Committee for Human Rights[20]. Our members and the public at large need certainty, and this does not exist where Governments fail to comply with judgments.

53. An example arises from the ECtHR's judgment in *Wilson, Palmer and Doolan v UK* which led to the eventual repeal of statutory provisions of a previous government found to be incompatible with rights under Article 11 ECHR. While this took some time to happen (around 20 years from the subject matter of the initial claims to the new legal rights being introduced), there remain concerns about whether the new statutory protections are adequate because of their limited scope for enforcement[21]. A solution to allow compliance with the ECHR in the sphere of employment rights could fall under s.23 Employment Relations Act 1999 which provides powers to confer rights on individuals (or make provisions which have the effect of modifying the operation of any right as already conferred) without the need for further primary legislation.

54. Separately, the Court of Appeal in *Wandsworth LBC v Vining and UNISON* decided that s.280 TULRCA 1992 must be construed so as to give effect to UNISON's rights under Article 11 ECHR in relation to claims about collective consultation for parks police that would otherwise have been excluded. However, as stated above, despite the judges pointing to a lacuna in the law and expressing their inability to remedy legislative deficiencies, Parliament is yet to correct legislation to account for this deficiency through a properly consulted upon and sufficiently scrutinized Act of Parliament.

55. The most recent example arises from the Court of Appeal's expected judgment in *IWGB v CAC and Deliveroo* where the union appealed the High Court's judgment that refused to read down the union's proposed interpretation of a 'worker' under s.296 TULRCA 1992. The union's appeal stems from a bar created by employment status of individuals' to the potential enjoyment of rights under Article 11 ECHR transposed to UK law and the Court of Appeal's judgment must take into account how the law on this topic is developing for those in the so-called 'Gig Economy'[22].

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[20] See the transcript of the hearing: https://committees.parliament.uk/oralevidence/1661/html/

[21] For example, the European Committee of Social Rights considers that the UK is in breach of the European Social Charter: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680595c15 (paras 133-136)

[22] See the UK Supreme Court's recent judgment in *Uber BV and others v. Aslam and others* [2021] UKSC 5 and *R (on application of IWGB) v Secretary of State for DWP and others* [2020] EWHC 3050

56. A final area of concern for UNISON where change is required arises from new powers conferred on the Certification Officer under the Trade Union Act 2016 which bring in new provisions to TULRCA 1992. The specific concerns broadly fall into two areas: firstly, that the ability of others to interfere with the running of a union when no complaint has been made by any member of that union is an impermissible restriction on the union's rights of association (i.e. to manage its internal affairs) under Article 11 ECHR. Separately, many expert legal commentators have highlighted that the cumulative effect of the CO's new powers to act as investigator, prosecutor and judge conflict with the right to a fair trial under Article 6 ECHR, particularly as the new powers include provisions for the CO to impose financial penalties and the CO itself faces potential judicial review if it does not exercise powers at the instigation of a third party[23].

d) In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change? It is acknowledged that if the extraterritorial scope of the HRA were to be restricted, other legislative changes beyond the HRA may be required in order to maintain compliance with the UK's obligations under the Convention. As such changes would fall outside the scope of the Review, the panel is not asked to make specific legislative recommendations on this issue, but only to consider the implications of the current position and whether there is a case for change.

57. UNISON considers that individuals whose ECHR rights have been infringed upon by UK state organisations should have the right to complain to UK Courts. It would be undesirable if the protection of law available in respect of state action in the UK did not also apply to those same state actions outside the UK. These rights are fundamental and universal human rights enjoyed by all and the protection of these rights should not depend on the place where those rights have been infringed. We appreciate that this may be another example where decisions of the UK Courts have not been met with great enthusiasm by the UK Government, but we consider that the principle articulated above, and by UK Courts, is correct. The law should not differentiate between potential classes of potential claimant, nor should the location of the alleged breaches of rights be a determinative factor. The protection of the law is for everyone, no matter where they live or where the breaches have taken place.

[23] See Arthur and Cavalier, ILJ Vol 45, Number 3, September 2016 and Harvey's, Volume M paragraphs 3903.01-3903.05

e) Should the remedial order process, as set out in section 10 of and Schedule 2 to the HRA, be modified, for example by enhancing the role of Parliament?

58. UNISON does not consider that the remedial order processes in section 10 or Schedule 2 of the HRA should be amended. UNISON considers that universal human rights such as those contained in the ECHR are only effective or meaningful if these are fully protected in law and there are real sanctions available where those rights have been interfered with. If the purposes of the HRA are to be met, then universal rights should not be allowed to become hollow, meaningless rights without proper sanction.

59. It is worth noting that the remedial provisions in section 10 have rarely been invoked by the UK government in response to declarations of incompatibility. In our view, removing these provisions has the potential to undermine the Rule of Law in that infringements of human rights can persist or reoccur for want of parliamentary intervention. Such a situation renders the prosecution of human rights abuses ineffective, which in itself undermines the common law right to access to justice and the Rule of Law. This also has the potential to undermine the UK's standing in international affairs and expose it to criticism in the UN Human Rights Committee for failing to provide adequate remedies for individuals suffering breaches of their rights.

60. It is worth noting that given the operation of s.3 HRA to read in words to include Convention rights when interpretating primary and secondary legislation has resulted in both s.4 declarations and s.10 remedial orders almost redundant. However, the deterrent of s.10 cannot be understated.

61. In making its submission, UNISON draws on experiences in other jurisdictions that have less forceful remedial provisions in making this submission. For example, the New Zealand Bill of Rights Act 1990 does not have any remedial legislation, the sole measure being the duty of the Attorney-General to declare incidences of incompatibility with proposed legislation to parliament under section 7 of that Act prior to that legislation being enacted. The sole express remedial provision therefore is in the hands of the executive and there is no express provision requiring parliament to act of the Attorney-General's advice or that prevents them from going ahead with the legislation in question. This lack of remedial provision in New Zealand has attracted much criticism. In 2015, the New Zealand High Court held that, notwithstanding the lack of express power, they had the jurisdiction to issue declarations of incompatibility: *Taylor v Attorney-General* [2015] 3 NZLR. New Zealand has received an unfavourable report by the UN Human Rights Committee in respect of this lack of remedies. As mentioned above, the Courts too have reacted to this by reading in rights to receive damages for breaches of the Act. It would be undesirable if

the UK, intentionally or unwittingly went down this route and also suffered domestic and international criticism in this way.

62. Further, it is not clear what would replace the current remedial regime. If that regime is restricted in any way, there is a real danger that the Courts will seek to fill the gaps by creating their own remedial regime. This again will create uncertainty for government organisation and individuals alike. Examples from other jurisdictions where Courts have responded to the lack of substantial remedial provision include New Zealand where the Court of Appeal held that awards of damages were available to individuals who suffered breaches of the New Zealand Bill of Rights Act 1990, effectively reading remedial provisions into the Act where this was silent: *Simpson v Attorney-General* [1994] 3 NZLR 667. In that case there was no mention of damages in the legislation itself. The Crown argued that the plaintiffs were not entitled to any remedies and the Crown was immune from such a civil claim. The Court of Appeal held that a mere declaration of incompatibility would be "toothless" and subsequently awarded damages for breaches of the Bill of Right.

63. If the remedial regime was altered, there is a danger that a diminution in available remedies would mean there was a reduced incentive for government organisations to respect or protect universal ECHR human rights. This may lead to an increase in breaches of those right. In these circumstances it may be that as a result, the HRA loses its deterrent effect. Again, this would be undesirable and would have to the potential to defeat the purposes of the HRA as set out in the Long Title.

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